

No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,
Appellant and Cross-Appellee,
vs.

RAYMOND M. CRANE, doing business as Associated Fruit
Distributors of California,
Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Pack-
ing Company,
Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

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FILED



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Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

This matter comes before the Court on an appeal by Joseph Denunzio Fruit Company, complainant herein, from a judgment of the District Court (Judge James M. Carter) dismissing the action as to Raymond M. Crane, doing business as Associated Fruit Distributors of California, and John C. Kazanjian, doing business as Red Lion Packing Company. The cross-appeal is by Crane.

The action originated before the Secretary of Agriculture under the provisions of the Perishable Agricultural Commodities Act of 1930, as amended. The Secretary of Agriculture rendered a Reparation Order against Crane and dismissed the proceeding as to Kazanjian. Crane

appealed to the United States District Court for the Southern District of California, Central Division, and on a trial *de novo* before Judge J. F. T. O'Connor the order of the Secretary of Agriculture was affirmed.

Crane made a motion for a new trial. Judge O'Connor died before hearing the motion. By stipulation, the motion was heard by Judge James M. Carter, who granted the motion but held that a new trial was not necessary because the contract relied upon by complainant was invalid, being in violation of the Emergency Price Control Act, and he thereupon ordered the action dismissed as to Crane and Kazanjian.

The cross-appeal by Crane is to review certain Findings of Fact and Conclusions of Law and is prosecuted so as to present a defense urged by Crane and not sustained by Judge O'Connor in the trial before him and not sustained by Judge Carter by reason of the fact that he adopted the Findings of Fact made by Judge O'Connor without change, and in addition thereto made certain Conclusions of Law consistent with said adopted Findings of Fact.

We feel that even though this Court should not agree with the reasoning of Judge Carter on the question of invalidity of the contract, still his decision should be affirmed for the reasons urged on this cross-appeal.

Opinions Below.

The opinion of the Secretary of Agriculture [Tr. pp. 63 to 79] is reported in 6 Agricultural Decisions 139.

The opinion of Judge O'Connor [Tr. pp. 82 to 137] is reported in 79 Fed. Supp. 117.

The opinion of Judge Carter [Tr. pp. 164 to 169] is reported in 89 Fed. Supp. 962.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is based on the provisions of law set forth in 7 U. S. C. A., Sec. 499(f)(g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo*, the appeal from the reparation order of the Secretary of Agriculture, is based on the provisions of the law set forth in 7 U. S. C. A., Sec. 499(g).

Jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is based upon the provisions of law set forth in Sec. 128 of the Judicial Code, 28 U. S. C. A., Sec. 1291.

Statutes Involved.

One of the statutes involved in this proceeding is the Perishable Agricultural Commodities Act set forth in 7 U. S. C. A., Sec. 499(a) to (r).

This Act deals with the shipping of perishable agricultural commodities in interstate commerce (Sec. 499(a)). It provides that it shall be unlawful in connection with any transaction in interstate commerce for any dealer to fail to deliver in accordance with the terms of a contract, without reasonable cause, any perishable agricultural commodity bought or sold, or contracted to be bought, sold or consigned in interstate or foreign commerce by such dealer (Sec. 499(b)(2)).

It licenses persons to engage in the business of commission merchants, dealers or brokers (Sec. 499(c)). It pro-

vides for liability on the part of a commission merchant, dealer or broker who violates any of the provisions of Section 499(b) to the person injured, for the full amount of damages sustained in consequence of such violation and provides for the enforcement of the liability by complaint to the Secretary of Agriculture or by suit in any court of competent jurisdiction (Sec. 499(e)).

It provides for the filing of a complaint with the Secretary of Agriculture by any person complaining of any violation within nine months after the cause of action arises (Sec. 499((f)(a))).

It provides for a hearing on the complaint by the Secretary of Agriculture and for a reparation order by the Secretary of Agriculture if the facts justify the same (Sec. 499(g)(a)).

It allows an appeal from a reparation order to the District Court of the United States for the District in which the hearing was held, within thirty days from the date of the reparation order and for a trial *de novo* by the District Court (Sec. 499(g)(c)).

The statutory provision allowing an appeal to this Court is Sec. 128 of the Judicial Code, 28 U. S. C. A., Sec. 1291, which provides for an appeal from a final judgment of the United States District Court to the United States Court of Appeals for the Circuit in which the District Court is located.

Statement of Pleadings and Facts.

PLEADINGS.

In its amended complaint filed before the Secretary of Agriculture, Denunzio alleged that complainant was a Kentucky corporation and that respondents Crane and Denunzio were residents of California and were licensed under the Perishable Agricultural Commodities Act of 1930 as dealers, commission merchants and/or brokers; that on October 3, 1944, in the course of interstate commerce Crane, acting as principal or agent for Kazanjian, or as both, contracted to sell Denunzio three carloads of California Emperor grapes to be shipped from California to Louisville, Kentucky; that one A. B. Rains, Jr., of Louisville, Kentucky acted as agent for all parties; that Crane and Kazanjian failed to ship or deliver the grapes; that complainant purchased replacement cars at a cost of \$5723.50 in excess of the contract price. [Tr. pp. 17 to 28.]

Crane filed an answer before the Secretary of Agriculture denying that he was acting as either principal or agent for Kazanjian in the sale of said grapes and alleged that he was acting solely as a buying agent for Denunzio; Crane further denied complainant's allegations for the reason that no valid contract was entered into; that negotiations were had leading up to the sale of said grapes but that certain stipulations of the negotiations were never complied with; that the buyer never signed a confirmation of sale or made a deposit of \$750.00 per car, and that no valid and enforceable contract was ever consummated; that Crane acted only as agent for complainant in a buying

capacity and was to receive \$50.00 per car as a procurement charge to be paid by the complainant; that Crane had no financial interest in the transaction other than the payment to him of said procurement charge; that if any cause of action exists it exists against Kazanjian. [Tr. pp. 49 to 52.]

Kazanjian also filed an answer [Tr. pp. 53 to 62], but in view of the fact that in the District Court complainant filed its election to take a judgment against Crane and dismiss as to Kazanjian [Tr. p. 138] the statement of Kazanjian's pleadings will be omitted.

FACTS.

Denunzio is a car-lot receiver, jobber and service wholesaler having its place of business at Louisville, Kentucky; A. B. Rains, Jr. is a food broker at Louisville, Kentucky; Crane is a broker or car-lot distributor having his place of business at Los Angeles, California; Kazanjian is a grower and packer at Exeter, California, and also operates as a broker. [Findings not objected to, Tr. pp. 139 and 145 and 171 and 172.]

(The following facts were shown by telegrams and copies of teletype conversations.)

On September 26, 1944, Crane sent a form telegram to thirteen different brokers throughout the United States, stating that he could book eighteen cars of Emperor grapes, the same to go in storage commencing October 9th, shipper to transfer title on or after December 10th, he paying all storage charges, \$500.00 part payment with con-

firmation, price \$2.53 net to shipper, Crane charging \$50.00 per car procurement charge. The telegram contained the code word "Adlam" which means "offer subject to confirmation." One of these form telegrams was sent to A. B. Rains, Jr. of Louisville, Kentucky. [Tr. pp. 198 to 202.] In a teletype conversation which followed between Crane and Rains on September 28th, Rains offered to take four cars of grapes on terms different than offered. Crane replied that the matter would have to be put up to the shipper as the deal was based exactly as we told you. [Tr. p. 222.]

On September 28th Crane wired Rains that it was impossible to make a deal except as quoted in his night letter (referring to his night letter of September 26th). [Tr. p. 203.]

On October 2nd Crane sent out another form telegram to the same brokers referring to the night letter of September 26th and quoting fifteen cars U. S. One at \$2.50 net on the same deal, asking for the parties to wire quick if they wanted any part of the deal. [Tr. p. 205.] As the result of a teletype conversation between Crane and Rains concerning the offers to sell Emperor grapes, Rains approved a sale of three cars to Krotzki, another commission merchant that he represented [Tr. p. 230] and thereafter and on October 2nd Crane telegraphed Rains as follows:

"Talked shipper Red Lyon Packing Company Confirms Kortski Necessary 750.00 car airmail deposit with signed confirmation Emperors available now Only two more cars possibly three same base." [Tr. p. 206.]

In a teletype conversation which occurred on October 3rd between Rains and Crane, each party orally confirmed two cars to Krotski and three cars to Denunzio, and Crane stated they would airmail confirmations for buyer's signature, and Rains stated he would airmail checks with signed confirmations when he received your (Crane's) copies. [Tr. p. 234.]

On October 3rd Rains mailed Crane a Standard Memorandum of Sale showing two cars of grapes sold to Denunzio for account of Associated Fruit Distributors. [Tr. pp. 236-7-8.]

On October 3rd Crane wired Kazanjian the facts with reference to the purchases and Kazanjian wired back stating they were satisfactory but injecting some new terms into the deal. [Tr. pp. 217-8.]

On October 10th Crane wired Rains:

“Shipped (r) Red Lion takes view account ceiling lifted any contracts Emperors voided * * *.” [Tr. p. 209.]

Kazanjian refused to ship grapes to Denunzio and this litigation resulted.

Statement of the Case.

After the death of Judge O'Connor a stipulation was entered into by all of the parties providing that said motion for a new trial could be heard before Judge James M. Carter; that said motion may be heard and decided on the judgment roll, together with the exhibits on file and without a reporter's transcript unless the Judge hearing said motion desires that a reporter's transcript be written up for his use in ruling upon said motion, and that the hearing on said motion for a new trial on the record provided for shall be without prejudice to raise any questions on appeal which appellant might deem proper in the event of a denial of his motion for a new trial and an appeal from the judgment. [Tr. pp. 161-3.]

In Judge O'Connor's Findings of Fact and Conclusions of Law he found and held:

1. Rains acted exclusively as buying broker for Denunzio.
2. Kazanjian was an undisclosed or partially disclosed principal.
3. Crane was not the buying broker for Denunzio.
4. Crane was not a principal.
5. Crane acted as agent for Kazanjian, an undisclosed or partially disclosed principal. [Tr. pp. 147-8.]

On the hearing of the motion for a new trial, counsel for Crane took the position that in view of the Findings and Conclusions of Judge O'Connor to the effect that Crane was not a principal but was the agent for Kazanjian, the contract relied upon by Denunzio was an illegal contract, it being a contract for the sale of grapes at a price in ex-

cess of the ceiling established under the Emergency Price Control Act.

The same argument was made to Judge O'Connor after he signified he would rule that Crane was the agent of Kazanjian and not the agent of Denunzio.

Before hearing argument on the motion for a new trial Judge Carter announced that he would not review the evidence in this case on the question as to whether or not the Findings of Fact were supported by the evidence, but would confine his ruling to the following questions:

1. Are the Conclusions of Law supported by the Findings of Fact?

and

2. Did the trial court properly apply the law to the facts as found by the trial court? [Tr. p. 181.]

After hearing the argument of counsel and giving further consideration to the matter, Judge Carter, by a written memorandum opinion [Tr. p. 164] held the contract to be a violation of the Emergency Price Control Act and void.

In the Findings of Fact Judge Carter adopted without change the Findings of Fact made by Judge O'Connor and some of his Conclusions of Law. Other Conclusions were changed to support his decision on the invalidity of the contract.

Among the Findings of Fact made by Judge Carter are the following:

1. That Crane offered to sell fifteen cars U. S. No. One Emperor grapes. [Tr. p. 173, subd. 4 of par. II.]

2. That Crane, on behalf of Kazanjian, repudiated the contract by his telegram of October 10, 1944, to Rains. [Tr. p. 175, subd. 10, par. II.]

3. That Crane repudiated the contract as agent by telegram dated October 13, 1944, to Rains. [Tr. p. 175, subd. 11, par. II.]

Among the Conclusions of Law made by Judge Carter, is the following:

That in negotiating the contract in question Crane was acting as agent for Kazanjian, who was the undisclosed or partially disclosed principal. [Tr. p. 177, par. III.]

That the contract in question, being for the sale of three carloads of grapes for a consideration consisting of two sums, the first sum being \$2.50 per lug to be paid to Raymond M. Crane as such agent * * * [Tr. p. 177, par. IV.]

Specifications of Error.

On this appeal cross-appellant Crane contends that Judge Carter erred:

1. In finding Crane offered to sell grapes.
2. In finding Crane, on behalf of Kazanjian, repudiated the contract by his telegram of October 10, 1944.
3. In finding Crane repudiated said contract as agent.
4. In making the implied Finding of Fact that in negotiating the contract in question Crane was acting as agent for Kazanjian, who was the undisclosed or partially disclosed principal.

5. In making the following Conclusion of Law:

“That in negotiating the contract referred to in paragraph II of the Foregoing Findings of Fact, * * * Crane, * * * was acting as agent for * * * Kazanjian, * * * who was the undisclosed or partially disclosed principal.” [Tr. p. 263.]

6. In holding that the Findings of Fact and the evidence support the Conclusion set forth in paragraph IV of said Conclusions to the effect that the sum of \$2.50 per lug was to be paid to Crane as agent for Kazanjian.

It is Crane's contention that the foregoing Findings and Conclusions are erroneous for the reason that the evidence discloses Crane was the agent of Denunzio—not Kazanjian.

Summary of Argument.

1. Crane acted as a buying agent or procuring broker for Denunzio.

2. Crane, being the agent of Denunzio, would not be liable to Denunzio for Kazanjian's failure to deliver under the alleged contract.

ARGUMENT.

Point I.

It is the contention of cross-appellant Crane that the telegrams and teletype messages heretofore summarized or set forth, and the evidence of Mark Denunzio, one of the officers of complainant corporation and the evidence of Raymond M. Crane, do not sustain either the Findings of Fact or Conclusions of Law, that Crane

(a) Offered to sell grapes.

(b) Acted on behalf of or as agent of Kazanjian.

It is Crane's contention that

a. He offered to buy grapes for Denunzio.

b. He was the buying broker or the purchasing agent for Denunzio.

We believe the evidence of Mark Denunzio supports Crane's contentions.

MARK DENUNZIO,

an officer of complainant corporation, testified [Tr. p. 241] that he had discussed with Rains the telegram of September 26th and that Rains told him that the telegram called for the payment of a procurement charge to Crane and that on that date he knew that Crane was asking for a procurement commission or fee, and that Denunzio was willing to pay the procurement charge and was willing to pay Associated (Crane) for their services in procuring the grapes. [Tr. p. 242.] There was nothing in the ceiling price stipulation which said we couldn't give him a fee for making the transaction and that is what we were doing by paying him his \$50.00 per car procurement charge and at that time

we understood we were paying him that money for services rendered. At the time we offered to pay him this \$50.00 it was understood we were paying him for his services in procuring these grapes. [Tr. p. 244.] At that time we knew Rains offered us grapes that had been offered to him by Associated for sale and we also knew that in order to get those grapes we were going to have to pay Associated (Crane) a procurement charge. We knew that at that time. Mr. Rains told us that and we were agreeable to doing that. [Tr. pp. 250-51.]

RAYMOND M. CRANE

testified as follows [Tr. p. 198]:

During the grape season of 1944 I visited Exeter and talked over the grape situation with Kazanjian. Kazanjian stated that he was not going to employ a distributor that year but that he would sell the grapes at his ceiling if I could secure buyers for them. At that time Kazanjian was a grower, packer and shipper and he said he would sell his grapes at his ceiling price. [Tr. pp. 199-200.] After my conversation with Kazanjian I sent wires to some of our connections who had inquired for grapes. I sent one telegram to Rains. Telegrams were sent to thirteen persons or companies. It was the telegram of September 26, 1944. [Tr. pp. 200-1.]

Under the practice followed by the produce industry the buyer pays the procurement charge. It was understood that the broker would notify the buyer that he could procure these grapes through us providing the buyer was willing to pay us a procuring charge or a buying charge, which is a standard practice, especially when there is a light supply available and a buying broker is necessary in

order to secure supplies. [Tr. p. 215.] It is an established practice among the produce industry as to whom a buying broker represents. A buying broker represents the buyer and in fact there are hundreds of buying brokers who act in that capacity in all fruit and vegetable deals, and that practice was customary during the period of time that we had O. P. A. ceilings, and I am quite sure it was engaged in by other brokers in Los Angeles. [Tr. p. 216.] In connection with the dealings involving these car lots of Emperor grapes, I did not make any offers as agent for Red Lion Packing Company or Kazanjian and I never made any offer to sell grapes to Rains or Denunzio. [Tr. pp. 220-1.] Under the O. P. A. ceiling as of December 10, 1944, a procurement charge or buyer's commission was the only way grapes were procurable and there was no provision for any profit under the ceiling and the only way that any deal could have been made is that we would act as a buyer's agent in procuring. That was the general practice and generally being done at that time on procuring grapes for eastern accounts. We were not able to make a profit as seller's agent. [Tr. pp. 221-2.]

I have known Rains since 1937. We generally sold to him as an agent for the packer or shipper. In this connection I had instructions from Rains or Denunzio which would place my dealings upon a different basis. They were the fact that we offered to buy these grapes for the buyer's account and the buyer indicated his agreement to buy on the basis we could procure the grapes and we indicated the only way we could obtain these grapes would be to act as agent for the buyer. Our authority from Denunzio was only as brought out by our communications with Rains as established by the exhibits. [Tr. pp. 222-3.]

We have never been able to reach an agreement with Kazanjian on the sale of these grapes by reason of the fact that we had never received any deposit and never received any confirmation of sale signed by the buyer as required in our communications to Rains. [Tr. p. 224.]

The foregoing testimony, together with the telegram of September 26th wherein Crane stated that he could book Emperor grapes upon terms which included a \$500.00 part payment on confirmation and a charge of \$50.00 brokerage charge to be paid by the purchaser, and that the offer was subject to confirmation, show beyond a doubt that Crane was acting as the agent for Denunzio and not for Kazanjian.

“Buying broker” and “procuring agent” are terms used in the produce business.

The Produce Reporter Blue Book, which is a publication followed by the produce industry, contains the following:

“‘Buying Brokers’ are special agents with authority to purchase—limited to direct instructions from their principals, and to those incidental powers which are reasonable and necessary for the accomplishment of the object of the agency.”

In a case decided by the Secretary of Agriculture and reported in 6 A. D. 928 (Agricultural Decisions) a question was presented as to whom a broker represented. The seller contended that the broker was the agent of the buyer, and the buyer contended that the broker was the agent of the seller. The Secretary held that the broker was

the agent of the seller as the seller had agreed to pay the agent's brokerage.

In the case of *Adams & Dodge v. Joseph Martinelli & Co.*, 6 A. D. 1018, a question was presented as to whom the broker represented in the transaction. The Secretary held the broker to be the buying agent for the purchaser.

In the case of *W. H. Russum v. Schowker Bros. & V. E. Turner, Jr.*, 6 A. D. 583, a seller of produce filed a proceeding against the purchaser and broker. The broker contended that the purchasers authorized him to order the car of tomatoes for them. In passing on the question of agency, the Secretary referred to the case of *Western Vegetable Distributors v. Sam Krasnow*, P. A. C. A. Docket No. 2312 S-1677, where the following statement is found:

"It has been held repeatedly that where an offer is made by a buyer to a broker who transmits it to the seller, the buyer thereby makes the broker his agent, at least for the purpose of transmitting such offer to the seller and receiving either an acceptance or rejection thereof."

The Secretary held the respondent Turner to be the broker for the purchaser, and dismissed the proceeding as to the broker.

In 5 A. D. 646 the Secretary stated "The evidence indicates that the broker's services were paid by the respondent partnership. It is clear that the broker was the agent of the respondent."

In the case of *Barker-Miller Distributing Co. v. Ber-*
man, 8 Fed. Supp. 60, an action was brought in the United
States District Court to enforce a liability determined by
the Secretary of Agriculture. With reference to the status
of the plaintiff in this proceeding the Court stated as fol-
lows:

“Plaintiff was not attempting to sell to the defend-
ant goods which it had acquired for its own purposes.
Plaintiff went into the market and made purchases
for defendant. Plaintiff was defendant’s purchasing
agent or broker and was paid a fee for his services
in purchasing for the defendant. There was no re-
lationship of buyer and seller despite the fact that the
plaintiff advanced the purchase money at the time of
obtaining the merchandise.”

It would appear from the above authorities and the evi-
dence heretofore referred to and quoted, that Crane was
acting as the buying agent or procuring broker for De-
nunzio and was not acting as the seller’s (Kazanjan’s)
agent.

Point II.

Crane, being the agent of the purchaser (Denunzio)
could not be held responsible for the default of Kazanjan
—the seller. Crane had no possession or control over the
grapes belonging to Kazanjan, and Kazanjan being the
one who refused to sell and deliver the grapes, Crane
could under no circumstances be liable for Kazanjan’s act.

Conclusion.

In conclusion we submit that the evidence in this case justifies a Finding that Crane was the agent of the purchaser and not the agent of the seller, and the Conclusion that Crane is not liable for default on the part of Kazanjian.

We feel that in the event this Court should not agree with Judge Carter's reasons for granting a dismissal of the action, still this Court should affirm the judgment of the trial court for the reason that under the evidence there is no liability on the part of Crane.

Respectfully submitted,

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